



United States Department of the Interior

FISH AND WILDLIFE SERVICE

5275 Leesburg Pike, MS: IRTM
Falls Church, VA 22041



IN REPLY REFER TO:
FWS-2019-00370

July 31, 2019

MuckRock News
DEPT MR 68320
411A Highland Ave
Somerville, MA 02144-2516
Email: 68320-06534593@requests.muckrock.com

Mr. Tobias:

The United States Fish and Wildlife Service (FWS) received your Freedom of Information Act (FOIA) request, dated January 30, 2019, and assigned it control number FWS-2019-00370. Please cite this number in any future communications with our office regarding your request. You requested the following documents pertinent to the FWS:

“Any written or electronic communications, including email attachments or text messages, that have been sent to Assistant Director Gary Frazer by one more more of the following individuals: Todd Willens, Aurelia Skipwith, Jason Larrabee and/or Susan Combs. This request seeks records that relate to the Endangered Species Act and/or endangered or threatened species. This request seeks records produced between September 1, 2018 and the date this request is processed.”

Response

We are writing to conclude our response to your request. We have previously partially responded to this request on May 14, 2019.

Today, we are providing you with 872 pages, 14 of which are released in full, and five of which have been marked for referral to another agency, which is addressed on page four of this letter. Eight hundred and fifty-three pages are withheld in part as described below:

Eight hundred and fifty-three pages are withheld in part under Exemption 5, which allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” [5 U.S.C. § 552\(b\)\(5\)](#). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including

the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

Exemption 5 Deliberative Process Privilege 5 U.S.C. § 552(b)(5)

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency’s deliberative processes; expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Exemption 5 Attorney-Client Privilege 5 U.S.C. § 552(b)(5)

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice and is not limited to the context of litigation. Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, related to legal matters for which the client sought professional legal assistance and services. It also encompasses opinions given by attorneys to their clients based on client-supplied facts. Additionally, the FWS employees who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice.

Finally, the FWS has held this information confidential and has not waived the attorney-client privilege.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

The decision to withhold/deny this information was made by the undersigned and approved by Cathy Willis, FWS FOIA Officer, Division of Information Resources & Technology Management (IRTM). This decision was made in consultation with Larry Mellinger, Attorney, Department of the Interior Office of the Solicitor.

Appeal Rights

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the Service's response is in error. You must also include with your appeal copies of all correspondence between you and Service concerning your FOIA request, including your original FOIA request and Service's response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, DC 20240

Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

Mediation Services

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. You also may seek dispute resolution services from our FOIA Public Liaison, Cathy Willis at 720-732-6687.

Referral

During our search, we located five pages that contain content originating with the Department of Commerce. Your request and the responsive pages have been referred to this Department for their release determination. Responses about these determinations will come directly from them. If you wish to contact the bureau, the mailing address is:

Catrina Purvis, CISSP, Esq.
Chief Freedom of Information Act Officer
Department of Commerce
Office of Privacy and Open Government
14th and Constitution Avenue NW
Mail Stop 61013
Washington, DC 20230
Email: cpo@doc.gov

Conclusion

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. See [5 U.S.C. 552\(c\)](#). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

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If you have any questions about our response to your request, you may contact Eileen Harke by phone at 703-358-2096 or by email at eileen_harke@fws.gov.

Sincerely,

Cathy Willis
FWS FOIA Officer

Enclosure